No. 83-296

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT A. LEBOVITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to post-conviction relief on the basis of his claim of a violation of Fed. R. Crim. P. 6(e)(2) in connection with the grand jury proceedings leading to his indictment.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is not reported. The opinion of the district court (Pet. App. 6a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1983. A petition for rehearing was denied on July 19, 1983 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on August 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on 13 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. Petitioner was sentenced to

concurrent terms of imprisonment of one year and one day, and was fined a total of $14,000. The court of appeals affirmed, *United States* v. *Lebovitz*, 669 F.2d 894 (3d Cir. 1982), and this Court denied certiorari, 456 U.S. 929 (1982). Thereafter, the district court denied petitioner's motion to dismiss the indictment or, in the alternative, for a new trial, based upon an alleged violation of the grand jury secrecy provisions of the Federal Rules of Criminal Procedure, Rule 6(e)(2) (Pet. App. 6a-39a). The court of appeals again affirmed, this time by an unpublished judgment order (Pet. App. 1a-3a).

1. The evidence at petitioner's trial established that petitioner, an attorney, participated in a scheme to defraud various insurance companies by submitting inflated medical bills, procured from physicians cooperating in the scheme, to the victimized companies, on behalf of personal injury claimants petitioner represented. See 669 F.2d at 895. On May 3, 1982, following exhaustion of avenues for direct review of his conviction, petitioner filed his motion in district court for dismissal of the indictment, or, in the alternative, a new trial, citing newly discovered evidence allegedly establishing a violation of the grand jury secrecy requirement of Fed. R. Crim. P. 6(e)(2) in connection with the grand jury proceedings leading to his indictment. The basis for the motion was the assistance given to United States postal inspectors investigating the subject fraudulent activities by Daniel Saccani, an agent of the Insurance Crime Prevention Institute (ICPI), a private investigative agency funded by the insurance industry.

After evidentiary hearings on petitioner's motion, the parties stipulated to certain facts (Pet. App. 10a-14a) and the district court made additional findings of fact (*id.* at 14a-21a). The evidence disclosed that: (1) Saccani had access to files from which some documents were presented

to the grand jury and shown to grand jury witnesses (*id.* at 10a-13a); (2) Saccani, through his relationship with the postal inspectors, was aware of the progress of the investigation against petitioner and had accompanied and assisted the postal inspectors conducting interviews of several potential grand jury witnesses (*id.* at 17a, 19a); and (3) Sacanni assisted postal inspectors in preparing materials for a "letter of presentation" to the Assistant United States Attorney concerning the investigation and also assisted in identifying and locating witnesses, serving subpoenas and labeling documents for identification (*id.* at 18a).

On the other hand, the district court also found that (1) Saccani was never present in the grand jury room; (2) Saccani at no time read a transcript of any grand jury testimony, or a summary of such testimony; (3) Saccani never had any discussions with anyone concerning what had transpired before the grand jury; and (4) Saccani did not present any information to the grand jury or make any decisions concerning the information to be presented to the grand jury (Pet App. 19a-20a.)

2. Based upon the foregoing findings of fact, the district court denied petitioner's motion to dismiss the indictment or for a new trial. The court concluded that neither Saccani nor any of the agents of the grand jury (the postal inspectors or the federal prosecutors) committed any violation of the rule of grand jury secrecy (Pet. App. 21a). Relying upon *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960), and its progeny, the court noted that Saccani's access to information obtained from sources independent of the grand jury was not regulated by Fed. R. Crim. P. 6(e)(2) and that his access to documents subsequently submitted to the grand jury did not reveal "matters occurring before the grand jury" (Pet. App. 22a, 24a-27a). The district court noted that the actual testimony of witnesses appearing before the grand jury was not disclosed to

Saccani (*id.* at 23a, 27a). In addition, the district court concluded that no prosecutorial misconduct had occurred in connection with the grand jury proceedings (*id.* at 23a), that Saccani's assistance to postal inspectors did not improperly influence the grand jury (*id.* at 21a, 27a-29a), that petitioner had suffered no prejudice resulting from Saccani's activities (*id.* at 23a, 29a, 30a-31a), and that petitioner had been "indicted by an impartial and unbiased grand jury" (*id.* at 22a). The court of appeals affirmed by judgment order (*id.* at 1a-3a).

ARGUMENT

Petitioner contends that the government violated Fed. R. Crim. P. 6(e)(2), by disclosing grand jury materials to Saccani during the investigation leading to petitioner's indictment. In the circumstances of this case, this claim — even if founded —would provide no basis for setting aside petitioner's conviction. In any event, contrary to petitioner's contention, the decision in this case does not conflict with *United States* v. *Tager*, 638 F.2d 167 (10th Cir. 1980), for, as the district court determined, there was simply no disclosure of grand jury materials in this case.

1. We note, initially, that the claim raised by petitioner alleging a violation of Rule 6(e) during the grand jury proceedings leading to his indictment would not, even if legally sound, afford any basis for collateral attack upon his judgment of conviction. Petitioner did not identify any procedural basis for his application (see C.A. App. 8A-17A). Petitioner's motion was, however, styled alternatively a motion for a new trial and a motion to dismiss the indictment. A motion for a new trial is ordinarily required to be filed within seven days of the finding of guilt, but may be made within two years of judgment, after the conclusion of appellate review, if the basis for the motion is newly discovered evidence. Fed. R. Crim. P. 33. Petitioner evidently relies on the latter branch of the rule. See page 2, *supra*;

C.A. App. 8A-9A. But we know of no authority for seeking a new trial under Rule 33 where the newly discovered "evidence" has no bearing upon the issues decided at trial and has nothing whatever to do with the guilt or innocence of the defendant. Compare *United States* v. *Agurs*, 427 U.S. 97, 111 & n.19 (1976). Alternatively, assuming that petitioner's application to the district court could be viewed as a motion pursuant to 28 U.S.C. 2255, relief upon his nonconstitutional claim is barred because the asserted violation of Rule 6(e)(2) does not, even by the wildest stretch of the imagination, entail " 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *Davis* v. *United States*, 417 U.S. 333, 346 (1974), quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962). See *United States* v. *Addonizio*, 442 U.S. 178, 185-187 (1979); *United States* v. *Timmreck*, 441 U.S. 780 (1979).

2. Even if petitioner's application were properly before the district court and a violation of Rule 6(e) were established in this case, petitioner would nevertheless be entitled neither to the dismissal of the indictment nor to the grant of a new trial.[1] Rule 6(e)(2) unambiguously provides that a "knowing violation of Rule 6 may be punished as a contempt of court." Thus, the courts of appeals have generally held that contempt is the normal remedy for breaches of grand jury secrecy. See *United States* v. *Stone*, 633 F.2d 1272, 1275 (9th Cir. 1979); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 219 (5th Cir. 1980); *United States* v. *Malatesta*, 583 F.2d 748, 753 (5th Cir. 1978), modified on other grounds, 590 F.2d 1379, cert. denied, 440 U.S. 962 (1979); *United States* v. *Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966); *United States* v. *United*

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[1] A new trial is plainly an inappropriate response to an alleged violation of the rule of grand jury secrecy.

States District Court, 238 F.2d 713, 721-722 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957). At the very least, "[d]ismissal of an indictment is required only in cases in which the grand jury has been flagrantly overreached or deceived in some significant way." *Stone*, 633 F.2d at 1274. Here, however, the district court specifically found that there had been no prosecutorial misconduct and no demonstrable prejudice to petitioner (Pet. App. 22a-23a).

As an additional ground for its decision, the district court observed that a supervisory power dismissal of an indictment ordinarily is unwarranted absent a showing of prejudice to the defendant flowing from the allegedly improper prosecutorial conduct (Pet. App. 30a-31a). Citing *United States* v. *Serubo*, 604 F.2d 807, 817 (3d Cir. 1979), and *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972), petitioner claims (Pet. 45) that dismissal may be a proper remedy even absent a showing of prejudice to the defendant. But the cited cases both involved practices with inherent potential to affect the deliberations of the grand jury: prosecutorial comments upon the veracity of grand jury witnesses giving testimony exclulpating the target along with comments, lacking an evidentiary foundation, linking the target with organized crime (*Serubo*), and presentation of hearsay testimony in circumstances that might mislead the grand jury into thinking that the testimony was that of an eyewitness (*Estepa*). Here of course, the grand jury was in no way exposed to the alleged violation; a technical breach of Rule 6(e)(2) occurring outside the confines of the grand jury is inherently unlikely to affect grand jury deliberations. Moreover, to the extent the cited decisions might stand for a broad rule dispensing with any showing of prejudice, their vitality is questionable in the aftermath of *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6-10, and *United States* v. *Morrison*, 449 U.S. 361 (1981).

In any event, there is no reason to believe that the Second Circuit would have decided this case differently from the court below, for there was no evidence of persistent prosecutorial misconduct in this case such as was perceived in *Estepa*. See 471 F.2d at 1137; see also *United States* v. *Artuso*, 618 F.2d 192, 197 (2d Cir. 1980). *Serubo*, moreover, rests upon repeated examples of egregious prosecutorial misconduct (see 604 F.2d at 810-818) that have no analogue here. The court of appeals' decision in this case obviously reflects its view that its prior decision in *Serubo* is not controlling here.

3. Unlike *United States* v. *Tager*, *supra*, there was no arguable violation of Rule 6(e)(2) here. In *Tager*, the district court had authorized the disclosure of grand jury materials to an ICPI investigator who was assisting postal inspectors and prosecutors pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i), which authorizes disclosure of such matters "preliminarily to or in connection with a judicial proceeding." As the prosecutor conceded in that case, grand jury materials, including transcripts of witnesses' testimony, were made available to the private investigator pursuant to the district court's order (638 F.2d at 169). The Tenth Circuit observed that the ICPI investigator was not a government employee authorized to receive such disclosure under Fed. R. Crim. P. 6(e)(3)(A)(ii) and that the disclosure of grand jury transcripts rendered the rule of *United States* v. *Interstate Dress Carriers, Inc.*, *supra*, inapposite (638 F.2d at 169). The court rejected the government's contention that the disclosure was properly directed "preliminarily to or in connection with a judicial proceeding" pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i), reasoning that the grand jury proceeding itself could not serve as the "judicial proceeding" for this purpose (638 F.2d at 169-171).

Here, by contrast, the district court did not hold that disclosure was permitted under Rule 6(e)(3)(C)(i); indeed, as respondent acknowledges (Pet. 32-33), the government did not seek authorization to disclose grand jury materials to Saccani on the basis of Rule 6(e)(3)(C)(i) or any other provision of law. Instead, because the record established that Saccani never entered the grand jury room, never reviewed grand jury transcripts or summaries of grand jury testimony, and because "[t]he documents and files obtained and observed by Saccani did not reveal the essence of what took place in the grand jury room or anything about the grand jury investigation" (Pet. App. 22a), the district court held that there had been no disclosure of grand jury materials.

Subject to the exceptions recognized in Rule 6(e)(3), Fed. R. Crim. P. 6(e)(2) establishes a "general rule of (grand jury) secrecy" prohibiting disclosure of "matters occurring before the grand jury." See *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 6-8. But it is well established that the mere fact that a document is reviewed by a grand jury does not convert it into a "matter[] occurring before the grand jury" for purposes of this prohibition. *In re Grand Jury Investigation (N.J. State Comm'n of Investigation)*, 630 F.2d 996, 1000-1001 (3d Cir. 1980); *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382-1383 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); *United States* v. *Stanford*, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d at 54. Here, ICPI investigator Saccani was permitted access to documents obtained by postal inspectors independent of the grand jury proceedings. Most of the information Saccani obtained concerning the investigation had been voluntarily turned over to the postal inspectors or to him directly (Pet. App. 13a, 16a). Other documents examined by Saccani had been seized pursuant

to search warrants and had not been obtained by grand jury subpoenas (*id.* at 13a). In such cases the courts have held that Rule 6(e) does not apply because these documents exist independent of the grand jury investigation, even if developed with an eye towards use in the grand jury. See *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982); *In re Grand Jury Investigation*, 630 F.2d at 1000. Because the Tenth Circuit recognized the "*Dress Carriers*" doctrine in *Tager* (638 F.2d at 169), and held it inapplicable only because the ICPI investigator there had been given access to grand jury transcripts, the decision below does not conflict in any respect with *Tager*.

Petitioner also contends (Pet. 17, 34) that because Saccani was present at interviews of witnesses prior to their grand jury testimony, he acquired information protected by Rule 6(e). But Rule 6(e) imposes no constraints of secrecy on grand jury witnesses. *In re Eisenburg*, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 217 (5th Cir. 1980); *United States* v. *Radetsky*, 535 F.2d 556, 559 (10th Cir.), cert. denied, 429 U.S. 820 (1976). Interviews conducted outside the grand jury room and prior to the time a witness testifies before the grand jury do not reveal the grand jury proceedings themselves and are not subject to Rule 6(e) (see Pet. App. 30a). *Clavir* v. *United States*, 84 F.R.D. 612, 614 (S.D.N.Y. 1979).[2]

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[2]Saccani testified that he never discussed whether or not there had been inconsistencies between the witnesses' grand jury testimony and their earlier statements, and the district court noted that no transcripts had been disclosed (C.A. App. 212-213, 223-224). Because pre-grand-jury statements were not themselves presented to the grand jury in any fashion, this case is distinguishable from *In re Grand Jury Matter (Garden Court Nursing Home, Inc., & Sidney D. Simon)*, 697 F.2d 511 (3d Cir. 1982) (summaries of witness interviews conducted outside of grand jury room presented to the grand jury), upon which petitioner relies (Pet. 35). Compare also *In re Special February 1979 Grand Jury (Baggot)*, 662 F.2d 1232, 1237-1238 (7th Cir. 1981) (prepared statement

In sum, because no grand jury materials were disclosed to Saccani, the secrecy requirement of Rule 6(e)(2) was not violated in any respect.[3] Petitioner acknowledges (Pet. 35) that the Third Circuit has generally given the rule of grand jury secrecy "the high priority and importance which it deserves." Accordingly, no further review of the fact-bound ruling in this case is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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from prior interview read by witness to the grand jury), aff'd, No. 81-1938 (June 30, 1983). As the Seventh Circuit observed in *Baggot* (662 F.2d at 1244), substantial deference is due to the determination of the trier of fact as to whether disclosure of statements or documents made or secured outside grand jury proceedings would compromise grand jury secrecy. The district court's careful assessment of the relationship between Saccani's activities and the grand jury proceedings in this case merits such deference.

[3]Nor is there any indication in the record that witnesses subpoenaed before the grand jury were improperly influenced by ICPI investigator Saccani (see Pet. App. 23a).